UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-320 36 9421-D1
Issued to: Gary Neale METCALFE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2180

Gary Neale METCALFE

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 22 June 1978, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's seaman's documents upon finding him incompetent for service as a seaman. The specification found proved alleges that while serving as able seaman on board the United States SS AMERICAN EAGLE under authority of the document above captioned, on or about 14 January 1978, Appellant, while the vessel was in the port of Portland, Maine, suffered from a "seizure".

The hearing was held at Port Arthur, Texas, on 30 January and 11 April 1978.

At the hearing, Appellant failed initially to appear but when granted a reopening of the case elected to act as his own counsel and entered a plea of not guilty to the charge.

The Investigating Officer introduced in evidence the testimony of witnesses and medical records.

In defense, Appellant offered in evidence the testimony of two witnesses. After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 27 June 1978. Appeal was timely filed and perfected on 27 October 1978. Since that time it has been learned that Appellant has died.

BASES OF APPEAL

This appeal was taken from the order imposed by the Administrative Law Judge. In view of the disposition necessary the numerous grounds asserted need not be spelled out.

APPEARANCE: Lyle C. Cavin, Jr. San Francisco, California, by Thomas A. Rasch, Esq.

OPINION

This proceeding was properly opened in absentia and had the initial decision been made on the basis of the record there would have been little difficulty in sustaining the pertinent findings and the order entered. The Administrative Law Judge observed that a prima facie case had been made out, and although he would have preferred to have Appellant subjected to medical examination for more evidence (a condition which was beyond his authority to require because of Appellant's failure to avail himself of the opportunity to appear at the hearing), he declared the hearing closed.

Two months later, on receipt of a letter from Appellant which the Administrative Law Judge construed as a request to keep the hearing open, Appellant was given an opportunity to appear. The record from this point on suffers from several flaws.

Documents which were apparently offered and accepted into evidence do not appear and cannot be accounted for on the face of the record itself. Other documents are mislabeled. The record reflects erroneous procedure in dealing with Appellant's merchant mariner's document, with the prospective service by mail of the written decision, and with the ascertainment of prior record in the event of an adverse finding.

Appellant designedly appeared without counsel, and when he was instructed of his right to testify in his own behalf, and his privilege to remain silent, the record leaves open a definite doubt that Appellant knew whether he was "testifying" (as the Investigating Officer plainly thought he was) or was making a very lengthy combined unsworn statement and argument (as the Investigating Officer found out when refused the opportunity to cross-examine). Inappropriately, it appears that Appellant was told by the Administrative Law Judge of his right "to question any witnesses that I call to testify against you," and toward the end of the hearing , after apparently noting a lack of "coherence" in the record, the Administrative Law Judge told Appellant, "What I do have hear from you and what I would like to hear from you is whether or not on January 14, 1978,...you had a seizure." This was precisely the matter on which Appellant had entered his plea of denial and as to which he was obliged to make no statement, since he had not been sworn as a witness in his own behalf.

The fact that the Investigating Officer was permitted to reopen his case on the continuation of the hearing without

reference to the fact that the case had been "rested" at the earlier session, and to introduce evidence of actions which occurred after the case had been "rested" and were, without more foundation, irrelevant to the allegations specified in the matter of the hearing, was another irregularity which, unfortunately, was reflected in the findings of the initial decision to Appellant's obvious prejudice.

There is reason to believe, from the record, that Appellant himself contributed to the irregularities which eventuated, but the hearing, nevertheless, should not have been permitted to get out of hand. Since Appellant has since died, a determination of the merits of the case has been rendered moot, but the procedural errors contaminated the case cannot be left unnoticed.

CONCLUSION

With the decease of Appellant the only appropriate order is one of dismissal of the charges.

ORDER

The findings and order on the charge of "INCOMPETENCE," entered at Houston, Texas, on 22 June 1978, after hearing at Port Arthur, Texas on 30 January and ll April 1978, are SET ASIDE, and the charges are DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed in Washington, D.C. this 8th day of January 1980.

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